NO. COA03-943

NORTH CAROLINA COURT OF APPEALS

Filed: 7 September 2004

STATE OF NORTH CAROLINA

v. Forsyth County
No. 02 CRS 31746
LAMONT ALEXANDER WAGNER 02 CRS 31747

Appeal by defendant from judgment entered 20 February 2003 by Judge Russell G. Walker, Jr. in Forsyth County Superior Court. Heard in the Court of Appeals 27 April 2004.

Attorney General Roy Cooper, by Assistant Attorney General Joseph E. Herrin, for the State.

David Childers for defendant-appellant.

STEELMAN, Judge.

At approximately 1:15 a.m. on 28 August 2001, Detective Michael Poe was on patrol in the Bethabra area of Winston-Salem. This was a largely Hispanic area. He was assigned to the robbery section of the Criminal Investigation Division. Heavy patrols were being conducted at Hispanic apartment complexes because of a series of robberies of Hispanics by a group of 3-4 black males. There had been two robberies that very night. As he approached the Apple Creek Apartments, he observed a vehicle occupied by 4 black males moving very slowly through the parking lot. The vehicle turned onto Bethabra Road going north, then onto a side street that ended

in a circle. At that point, Detective Poe began to follow the vehicle, and observed the two passengers in the back seat "slumped down." The vehicle drove back out of the side street and proceeded south on Bethabra Road. Detective Poe believed that the passengers were attempting to hide from him. After calling for backup officers, he activated his blue light and stopped the vehicle.

As Detective Poe approached the vehicle, Officer Gomez advised him that the passenger in the right rear seat had a gun. That passenger was removed from the vehicle and was disarmed. Defendant was seated in the front passenger seat and was taken out of the vehicle. When frisked, he was found to have a 9 mm pistol in his waistband. Defendant was taken to the Public Safety Center, and advised of his *Miranda* rights by Detective Flynn. After waiving his *Miranda* rights, defendant confessed to two robberies that had taken place on the night of the stop, as well as to a robbery of a Food Lion grocery store that took place on 22 June 2001. Defendant was indicted for robbery with a dangerous weapon and possession of a firearm by a felon arising out of the 22 June 2001 incident.

Prior to trial, defendant filed a motion to suppress the evidence of the stop of the vehicle on 28 August 2001, and his subsequent confession. This motion was heard by Judge Walker on 19 February 2003, and was denied. Defendant was tried before a jury and was found guilty of both charges on 20 February 2003. Judge Walker consolidated the two charges for sentencing and imposed an active term of 117 to 150 months in prison. Defendant appeals.

In his first assignment of error, defendant argues that the trial court erred in overruling his objection to Detective Poe expressing an opinion that the two passengers were attempting to hide from him. We disagree.

During the hearing on defendant's motion to suppress, Detective Poe testified on two separate occasions as follows:

> [Detective Poe:] I saw two subjects in the backseat, slumped down in the backseat like they were trying - - - trying to hide from - - -
>
> Mr. Mauney: Object to the characterization.
>
> THE COURT: Overruled.

And:

> [Detective Poe:] Two people in the backseat tried to hide from me, in my opinion- -
>
> Mr. Mauney: Object to the characterization.
>
> THE COURT: Overruled.
>
> - - slumped down.

Defendant contends that it was improper for Detective Poe to give his opinion of the intent of the two backseat passengers in the vehicle to hide from him, citing *State v. Brower*, 289 N.C. 644, 224 S.E.2d 551 (1976). In *Brower*, a witness testified that one robber went over "to assist" the other robber. Defendants contended that this was testimony of the robber's intent, and was impermissible. Our Supreme Court held that the statement was simply a narration of the sequence of events, a shorthand statement of fact. Similarly, the first portion of Detective Poe's testimony

in this case was simply a statement of his observation of the events.

In the second portion of his testimony, Detective Poe did utilize the word "opinion." Rule 701 of the North Carolina Rules of Evidence does permit a lay witness to testify in the form of an opinion limited to those "which are (a) rationally based on the perception of the witness and (b) helpful to a clear understanding of his testimony or the determination of a fact in issue." Rule 701. Further, "[o]pinion evidence as to the demeanor of a criminal defendant is admissible into evidence." *State v. Stager*, 329 N.C. 278, 321, 406 S.E.2d 876, 900 (1991).

In the instant case, Detective Poe had an opportunity to observe the vehicle, and the manner in which the backseat passengers "slumped down." This was a rationally based perception which was helpful to the trial court in understanding why Detective Poe subsequently stopped the vehicle. This assignment of error is without merit.

In defendant's third assignment of error, he contends that the trial court erred in denying his motion to suppress evidence of the stop of the vehicle. We disagree.

Defendant did not assign error to any of the findings of fact made by the trial court. In the absence of an exception to the findings of fact, they are assumed to be supported by competent evidence and are binding on appeal. *State v. Pendleton*, 339 N.C. 379, 389, 451 S.E.2d 274, 280 (1994). Our review of this assignment of error is thus limited to whether the trial court's

conclusions of law are supported by the findings of fact. *See State v. McKinney*, 153 N.C. App. 369, 372, 570 S.E.2d 238, 242 (2002).

The Fourth Amendment of the Constitution of the United States of America and Article I, Section 20 of the North Carolina Constitution prohibit unreasonable searches and seizures. These constitutional provisions apply to "brief investigatory detentions such as those involved in the stopping of a vehicle." *State v. Watkins*, 337 N.C. 437, 441, 446 S.E.2d 67, 70 (1994)(citation omitted). An investigatory stop must be based upon a reasonable articulable suspicion the person is, was or will be involved in criminal activity. *Terry v. Ohio*, 392 U.S. 1, 20 L. Ed. 2d 889 (1968), *State v. Thompson*, 296 N.C. 703, 252 S.E.2d 776, cert. denied, 444 U.S. 907, 62 L. Ed. 2d 143 (1979). In determining the validity of the stop, the reviewing court must consider the totality of the circumstances known to the officer at the time of the stop, and determine whether a "reasonable and cautious" police officer would have had a reasonable articulable suspicion that criminal activity was afoot. *State v. Jones*, 96 N.C. App. 389, 395, 386 S.E.2d 217 221 (1989). The experience and training of the officer is a factor to be considered in determining the reasonableness of the stop. *Thompson*, 296 N.C. at 706, 252 S.E.2d at 779. "[N]ervous, evasive behavior is a pertinent factor in determining reasonable suspicion." *Illinois v. Wardlow*, 528 U.S. 119, 124, 145 L. Ed. 2d 570, 576 (2000). Other relevant factors include: "activity at an unusual hour, . . . [activity in a] high crime area, and unprovoked flight. None of these factors,

standing alone, are sufficient to justify a finding of reasonable suspicion, but must be considered in context." *State v. Roberts*, 142 N.C. App. 424, 429, 542 S.E.2d 703, 708 (2001)(citations omitted).

In this case, the trial court made the following findings of fact:

> 1. That preceding the night of August 28, 2002, Winton-Salem police officers were investigating a series of robberies involving Hispanic victims and black assailants;
>
> 2. That on this occasion, Officer Poe, in a marked police vehicle, was patrolling apartment complexes on Bethabra Road which were primarily inhabited by Hispanic persons;
>
> 3. That Officer Poe observed a vehicle carrying four black males driving slowly in and out of the parking lots of apartment complexes in the area;
>
> 4. That when Officer Poe began to follow them, the two males in the back seat appeared to slump down to hide themselves;
>
> 5. That Officer Poe was aware that earlier that evening two armed robberies of Hispanics had been reported in the area;
>
> 6. That the number and race of the occupants of the vehicle and the manner in which it was being operated raised a reasonable suspicion in Officer Poe's mind that this vehicle and its occupants might be involved in those robberies;
>
> 7. That acting upon that reasonable suspicion, Officer Poe stopped the motor vehicle and called for assistance[.]

The trial court then concluded that the stop of the vehicle was based upon a reasonable articulable suspicion.

While none of the factors relied upon by Detective Poe in stopping the vehicle would, by itself, support a reasonable articulable suspicion of criminal activity, taken together and viewed in the totality of the circumstances, they do support the trial court's conclusion that the stop of the vehicle was proper. *State v. Blackstock*, __ N.C. App. __, __ S.E.2d __ (2004). This was an investigatory stop and not an arrest. This Court must therefore review the case under the lesser "reasonable articulable suspicion" standard and not under the "probable cause" standard applicable to arrest situations.

The trial court properly denied the motion to suppress the stop of the vehicle in which defendant was a passenger. This assignment of error is without merit.

In defendant's second assignment of error, he contends that the trial court erred in overruling his objection to the presentation of evidence of what occurred after the stop of the vehicle, at the hearing on his motion to suppress. We disagree.

At the hearing of defendant's motion to suppress, the court received evidence of the events leading up to the stop of the vehicle, the arrest of the defendant and defendant's confession.

We note that the trial court's second conclusion of law stated: "That the evidence discovered upon stopping the vehicle and searching its occupants confirms the reasonableness of that suspicion." This is not a correct statement of the law. The fact that incriminating evidence is found cannot be a basis to validate

an unlawful search. *United States v. Jacobsen*, 466 U.S. 109, 114, 80 L. Ed. 2d 85, 95 (1984).

However, we find this second conclusion of law to be surplusage in light of our discussion of defendant's third assignment of error. The trial court's conclusion that the stop of the vehicle was based upon a reasonable articulable suspicion was supported by its findings of fact. Any evidence received of the events following the stop was not necessary to support the ruling of the trial court. This assignment of error is without merit.

In his fourth assignment of error, defendant contends that the trial court erred in not giving defendant credit for time served awaiting trial. We disagree.

N.C. Gen. Stat. § 15-196.1 (emphasis added) provides that: "The minimum and maximum term of a sentence shall be credited with and diminished by the total amount of time a defendant has spent, committed to or in confinement in any State or local correctional ... institution *as a result of the charge that culminated in the sentence*." At the sentencing hearing, the trial judge directed: "Give him credit for the time he's been held awaiting trial." The judgment in these cases, signed by the trial judge, stated: "Defendant receives no credit in this case. He has been held on other charges. Credit will be given in those cases."

The record in this case shows that defendant was indicted for the charges on 7 October 2002 and tried on 19-20 February 2003. It does not contain an arrest warrant, any documents pertaining to the setting of conditions of pretrial release, or anything showing that

defendant was incarcerated awaiting trial on these charges. It is incumbent upon a defendant to present a proper record on appeal for this court to review. *State v. Alston*, 307 N.C. 321, 341, 298 S.E.2d 631, 644 (1983). An appellate court will not presume error where none appears in the record. *Id.* at 341, 298 S.E.2d at 645. This Court will not engage in speculation as to whether the defendant was held in custody awaiting trial on the charges that are the subject of this appeal. This assignment of error is without merit.

Because defendant has not argued his other assignments of error in his brief, they are deemed abandoned. N.C.R. App. P. Rule 28(b)(6) (2003).

NO ERROR.

Judges WYNN and CALABRIA concur.

Report per Rule 30(e).